

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 16, 2008 Session

IN RE G.T.B.

**Appeal from the Juvenile Court for Wilson County
No. 5684 Barry Tatum, Judge**

No. M2008-00731-COA-R3-PT - Filed November 24, 2008

The Department of Children's Services ("DCS") sought to terminate the parental rights of the mother of G.T.B. At the September 17, 2007 termination hearing, DCS chose not to call a witness from whom the mother and the court wanted to hear testimony. The court fined DCS and continued the hearing. When the hearing was held in November 2007, the mother's attorney moved for a dismissal before DCS called all its witnesses. The court granted the motion. DCS appeals, claiming it should not have been fined for failing to call a particular witness and it should have been allowed to have all its witnesses testify. We agree with DCS on both issues. The trial court is reversed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Reversed
and Remanded**

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., and WALTER C. KURTZ, SR. J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Douglas Earl Dimond, Senior Counsel; Nashville, Tennessee; for the appellant, State of Tennessee, Department of Children's Services.

Debra L. Dishmon, Lebanon, Tennessee, for the appellee, B.N.B., mother of G.T.B.

David Kennedy, Lebanon, Tennessee, Guardian ad Litem for B.N.B.

OPINION

G.T.B. was born in July 2000. Ten days after the birth, the Tennessee Department of Children's Services ("DCS") obtained custody after filing the Petition to Adjudicate Dependency and Neglect and for Emergency Removal. DCS filed the Petition to Terminate Parental Rights on December 1, 2006, claiming that Mother had not substantially complied with her permanency plan, that she had not remedied the persistent conditions in her life that prevented reunification with the child, and that she was so mentally impaired that she was incapable of parenting the child. In

January 2007, counsel for Mother sent discovery requests to DCS. These requests became the subject of a motion to compel and were finally submitted to counsel for Mother on July 9, 2007. DCS did not file a motion for service by publication on the putative father and the unknown biological father¹ until July 3, 2007, seven months after filing the termination petition. The Notice of Filing for the proof of publication was not filed until September 14, 2007, just before the hearing on the termination petition was to commence on Monday, September 17, 2007.

On September 17, 2007, DCS proposed to call DCS employee Linda Carney to testify from the DCS records as to the events surrounding the child's removal from Mother. Mother's attorney objected, stating, "Leslie Kelly was the original CPS investigator, and she is still with the Department. I see no reason why she can't be here to testify." She later added, "There are issues that have occurred or events that have occurred that are not reflected in the case recordings, and I need an opportunity to cross-examine Ms. Kelly." Mother's Guardian Ad Litem also objected to DCS's failure to call Ms. Kelly. The judge preferred to hear from Ms. Kelly as well, saying: "I'd much rather hear from the person who's out there where the rubber meets the road." The child's Guardian Ad Litem moved the court for a continuance "until we can have Ms. Kelly here." The court granted the motion, and gave the following reasons:

due to the inefficiency of the Department of Children's Services not having an essential witness present for a Termination of Parental Rights Hearing, with the witness being absent due to a planned vacation and therefore not an emergency, that Counsel for Department of Children's Services acknowledged in Court that she had this information three (3) weeks prior to the hearing. This case was set for trial on the State's own Motion on April 9th, 2007. This Court also finds that several discovery exhibits were not made available until Friday the 14th of September. Upon the motion of Jimmy Lea, Guardian ad litem, it would be in the child's best interest to continue this Hearing in order for the Department of Children's Services to get their case properly prepared.

Interestingly, at no time did DCS's attorney seek a continuance and, despite their professed need to have Ms. Kelly testify, neither Mother's attorney nor Mother's Guardian Ad Litem subpoenaed Ms. Kelly to appear at the September 17, 2007 hearing.

The trial court decided that DCS should pay the attorney's fees for the Mother's attorney, the Mother's Guardian Ad Litem, and the child's Guardian Ad Litem for two days of trial "due to the fact that they set aside two (2) days for this trial and now it cannot be heard due to the Department not being properly prepared for the Hearing." DCS filed a motion to reconsider which was denied.

¹This is no mistake. The Order for Service by Publication provides notice to "Johnny Madrid, putative father and the unknown biological father of [G.T.B.]."

The termination of parental rights hearing began on November 5, 2007,² with the testimony of Lovita Greer, the DCS case manager. Her testimony may fairly be described as unfavorable to DCS. She first testified that no relatives desired to be considered for placement and then contradicted her testimony by indicating that she did not contact any of the relatives except for the maternal grandfather and his wife. The trial court found her testimony reflected that long periods of time would pass without any home visits and without the provision of services to Mother by DCS. Dr. Sandra Phillips, DCS's expert, testified that Ms. Greer told her "basically that her goal was to make sure that this baby did not go to [Mother], and that she was pretty well willing to do whatever to make that happen."

After Dr. Phillips' testimony, Mother's attorney moved for a directed verdict, arguing that permitting DCS to finish its proof was pointless because Ms. Greer's testimony demonstrated that DCS failed to make reasonable efforts to reunite the mother and child. The trial court granted the motion, finding that "the remaining witnesses disclosed by DCS do not have the ability to change the clear and convincing burden of proof which indicates that DCS failed to remain objective in an effort to provide reasonable efforts. Further, the listed witnesses cannot change the fact that DCS neglected to adequately pursue a relative placement for the minor child." DCS appealed, maintaining that the juvenile court had no authority to assess attorneys' fees against DCS or, in the alternative, erred in doing so under the facts of this case. DCS also argues that the juvenile court improperly dismissed the petition because DCS had not finished presenting its case.

Attorneys' Fees

Mother's attorney and Guardian Ad Litem contend that the attorneys' fees were sanctions for various misdeeds, for example, the late filing of several discovery exhibits. An appellate court reviews a trial court's imposition of sanctions under an abuse of discretion standard. *Alexander v. Jackson Radiology Assoc., P.A.*, 156 S.W.3d 11, 14 (Tenn. Ct. App. 2004). "An abuse of discretion occurs where the trial court has applied an incorrect legal standard or where its decision is illogical or unreasoned and causes an injustice to the complaining party." *Id.*

The judge based his decision on the failure of DCS to be prepared for trial. Yet, DCS did not seek the continuance; the child's Guardian Ad Litem sought the continuance with the support of Mother's attorney and Mother's Guardian Ad Litem. The child's Guardian Ad Litem sought the continuance "until we can have Ms. Kelly here." DCS did not intend to call Ms. Kelly, whom Mother's attorney and Mother's Guardian Ad Litem wanted to examine and whom they did not subpoena. DCS's decision not to use Ms. Kelly apparently took them by surprise.

DCS chose not to call Ms. Kelly for the September 17, 2007 hearing but to use instead another witness regarding DCS's actions. The use of one witness instead of another may simply be

²The September 17, 2007 hearing was rescheduled to this date.

a matter of availability.³ It may also be a matter of trial strategy or arise from the fact that one witness expresses herself better than another. Regardless, it is the department's right to decide what witnesses to use. *See Coates v. Thompson*, 666 S.W.2d 69, 76 (Tenn. Ct. App. 1983). Nothing required DCS to call a witness that Mother's counsel wanted to examine. Nothing prevented Mother's counsel from subpoenaing Ms. Kelly to attend. Consequently, the trial court erred in sanctioning DCS for failing to call Ms. Kelly as a witness at the September 17, 2007 hearing. The trial court's award of attorneys' fees is reversed.

Dismissal Before Completion of Proof

The trial court's order indicates that "counsel for Mother moved this Court for dismissal pursuant to Tenn. R. Civ. Proc. 41.02 on the ground that upon the facts and the law the plaintiff has shown no right to the relief requested, that being termination of Mother's parental rights."

When a motion to dismiss is made at the close of a plaintiff's proof in a non-jury case, the trial court must impartially weigh the evidence as though it were making findings of fact and conclusions of law after all the evidence has been presented. If a plaintiff's case has not been established by a preponderance of the evidence, then the case should be dismissed if the plaintiff has shown no right to relief on the facts found and the applicable law.

Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 711 (Tenn. 2007) (citations omitted). The trial court's granting of the motion to dismiss does not comply with Tenn. R. Civ. P. 41.02.

The trial court's dismissal of the state's case before the state had even completed its proof is most unusual, but not unheard of. In *Harris v. Baptist Memorial Hospital*, 574 S.W.2d 730 (Tenn. 1978), the trial court dismissed the case *sua sponte* after hearing only the opening arguments of counsel. The Supreme Court determined that "trial judges of this State are not authorized to order the involuntary dismissal of an action at trial upon the sole basis of the opening statements of counsel." *Id.* at 731. The court quoted Tenn. R. Civ. P. 41.02(2),⁴ and observed that "this rule contemplates that the plaintiff's evidence shall be heard and evaluated by the court prior to an involuntary dismissal order at trial." *Id.* at 732.

In *Burrow v. Barr*, No. 01A01-9806-CV-00311, 1999 WL 722633 (Tenn. Ct. App. Sept. 17, 1999), Burrow sued over the purchase of a used car with significant mechanical troubles that affected the car's value at the time of sale. After he had put on two witnesses, and while at least two others

³The record indicates Ms. Kelly was on vacation.

⁴The language of Tenn. R. Civ. P. 41.02(2) today is substantially similar to the way it read in 1978. The first sentence currently reads: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

were under subpoena and waiting to testify, the trial court dismissed the case prior to the presentation of all of Burrow's proof. He had not rested or closed his proof. As the appellate court observed:

Quite simply stated, Burrow was not afforded an opportunity to attempt to fully present the facts and his evidence (subject to objections as to the admissibility of evidence). The trial judge simply curtailed any further opportunity for Burrow either to attempt to introduce additional testimony prior to the completion of his case in chief, or even to explain why further testimony might be necessary and/or appropriate.

Burrow, 1999 WL 722633 at *4. After a discussion of *Harris*, the appellate court determined:

While *Harris* clearly recognizes "that a trial court may ... *sua sponte* order the involuntary dismissal of an action," it further sets forth the proposition that a litigant should not be denied the opportunity to be heard or to fully present the facts and evidence in the case. While *Harris* undoubtedly involved a more egregious denial of a plaintiff's opportunity to fully present the facts and evidence, we nonetheless find that, *under the circumstances of this case*, the trial court similarly erred by denying Burrow the opportunity to fully present the facts and his evidence.

Id. at *5.

Similarly, in *Ruff v. Raleigh Assembly of God Church, Inc.*, No. 02A01-9410-CV-00226, 1996 WL 9730 (Tenn. Ct. App. Jan. 9, 1996), Ruff's case was dismissed before he called all his witnesses. The appellate court examined *Harris* and determined:

Given the holding in *Harris*, we have concluded that the trial court erred in dismissing Plaintiff's case at this stage of the proceedings. This cause is remanded to the trial court where, this being a non jury trial, the plaintiff shall be allowed to complete the presentation of his proof. Obviously, the defendant will be allowed to proceed with the presentation of any evidence it deems necessary.

Ruff, 1996 WL 9730, at *4.⁵

Like the courts in *Burrow* and *Ruff*, we view the language of *Harris* and Tenn. R. Civ. P. 41.02(2) as requiring that a plaintiff be allowed "his day in court" by presenting all of his evidence. After all, "[t]he business of trial courts is to try cases." *U.S. v. Barnett*, 376 U.S. 681, 724 (1964)(Black, J., dissenting). DCS has the burden of proof, and, once a case has proceeded to trial, the trial court should allow DCS to present all of its proof, subject to the rules of evidence, before deciding whether the case should be dismissed, either *sua sponte* or upon the defendant's motion.

⁵ We note that both *Burrow* and *Ruff* involved the trial judges involuntarily dismissing the cases *sua sponte*, whereas in the instant case the dismissal was upon motion of the defendant. We do not consider this distinction material.

Furthermore, the action by the trial court in this case frustrates the appellate court's ability to perform its duties under the applicable standard of review by denying it the opportunity to evaluate all of the plaintiff's evidence. *See Bldg. Materials Corp.*, 211 S.W.3d at 713. The trial court erred in dismissing the case before DCS completed its proof.

Conclusion

The trial court's award of attorneys' fees and its order of dismissal are reversed. The case is remanded to the trial court for completion of the state's case since this is a non jury trial. Once the plaintiff's case is completed, the trial court may entertain any proper motions made by the defendant or hear defendant's proof. Costs are assessed against DCS.

ANDY D. BENNETT, JUDGE